FILED
UNITED STATES DISTRICT COURT
ALBUQUERQUE, NEW MEXICO

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,
Plaintiff,

-vs-

CHRISTOPHER ROYBAL,
Defendant.

Civil No. 1:16-cv-00932-JB-KK
Case No. 12-cr-3182-JB

DEFENDANT'S SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE PURSUANT TO 28 U.S.C. § 2255

COMES NOW, Christopher Roybal, the Defendant, filing in pro se, and respectfully submits this Memorandum of Law in support of his Motion to vacate sentence pursuant to 28 U.S.C. § 2255. Defendant states the following in support:

1. Statement Of The Case

Defendant was indicted for a multi count conspiracy that included 16 other defendants related to the trafficking of cocaine. Ultimately the Defendant plead guilty to five counts of a multi count indictment related to conspiracy to distribute 5 kilograms or more of a mixture and substance containing cocaine in violation of 21 U.S.C. §§ 841(b)(1)(A) and 846, and four counts in violation of 18 U.S.C. § 1956(a)(1)(A)(i), and 1956(a)(3)(B) related to laundering of monetary instuments and aiding and abetting money laundering.

On July 28, 2015, Defendant was sentenced to 168 months following his guilty plea to Counts 1, 37, 38, 39, and 40 of the 63 count indictment.

Ground One.

Defendant claims to have received ineffective assistance of counsel when counsel failed to file a motion to suppress evidence gained by the government in violation of the Fourth Amendment of the United States Constitution. Several issues came to light during pre-trial investigation that call into question the Government's possible unauthorized use of a "StingRay" cell-site simulator that was used to gather evidence against the Defendant in violation of 18 U.S.C. §§ 2703(d),3123(a), 3123(b)(1)(c), and 3124(a). This device was used to determine that Defendant was in control of cell phones that were not the target phone under authorized wire-taps, and to gather phone numbers and information against the Defendant and his co-defendants, which ultimately led to the interception of 716 phone calls and 186 text messages that were used to prosecute Defendant.

Defendant's counsel failed to compel discovery related to the use of the StingRay device when it was clear that the warrantless use of this device violated Defendant's Fourth Amendment rights. Counsel withheld important research material that would have altered Defendant's decision to pursue the wiretap suppression hearing. This material was given to Defendant immediately after sentencing.

This eleventh hour revelation by counsel and the lack of open discovery by the Governemnt are clear violations of Defendant's Fourth and Sixth Amendment rights.

A. Applicable Legal Standard

Section 2518(10)(a) of Title III states that any "aggrieved person" may move to suppress the contents of any wire or oral communication intercepted pursuant to Title III. **or any fruits derived therefrom,** on the grounds that the communication was unlawfully intercepted or was not made in conformity with the authorizing order. 18 U.S.C. § 2518(10)(a)(i)-(iii). An "aggrieved person" for Title III purposes is one who is either (1) a party to any intercepted communication, or (2) a person against whom the interception was directed. Id. § 2510(11).

In 2010, the FBI conducted an investigation into the activities of Luis Villa and Hugo Chavez in which wiretaps were used. However, it was discovered that the affiant, Agent Jeremy Clegg, had cut and pasted facts of an earlier investigation wich was not related to the Chavez case. See United States v. Chavez, et al., No. 10-MR-149-MCA. Rather than informing the court through an affidavit as to the reasons why physical surveillance would be insufficient in the Villa and Chavez investigations, Agent Clegg copied and pasted from the Aispuro affidavit. (Chavez Affidavit at p. 28-29, Villa Affidavit at p. 25-26). Additionally, Agent Clegg used facts unique to the Aispuro case to detail counter-surveillance techniques being that he alleged were being employed by Villa and Chavez. (Chavez Affidavit at p. 31, Villa Affidavit at p. 27). Further, Agent Clegg used information from the Aispuro affidavit regarding the limited capacity of informants and pasted it into the Villa and Chavez affidavits. Agent Clegg also used information from the Aispuro affidavit in arguing that grand jury and administrative subpoenas and interviews of subjects would not succeed in the Villa and Chavez investigations. (Chavez Affidavit at p. 34, Villa Affidavit at p. 30).

It was during the wiretap investigation of Hugo Chavez ("HC") that the FBI intercepted thirteen phone calls between the Defendant and HC from May 13, through May 14, 2010. As a result of the information obtained from these wirtaps, agents concluded that the Defendant was working with or under HC and that HC was supplying the Defendant with cocaine. Agent Clegg also noted his awareness of Defendant's criminal history related to drug charges, including the distribution of cocaine. (Hugo Chavez Criminal Complaint, No. 1:10-cr-01731-MV, Doc1, p. 3).

On May 14, 2010, the FBI observed the Defendant deliver duffel bags to HC on two different occasions: (1) "...surveillance observed Chavez take possession of a green duffle bag from Christopher Roybal."

(2) "Subsequently, Chavez and Jennifer Crowther were observed meeting with Roybal for a second time and taking possession of another duffle bag, militarily green and black in color." (Hugo Chavez Criminal Complaint Doc 1, p. 3). Surveillance also observed Roybal delivering approximately $260.000.00 in cash to Chavez.

On May 17, 2010 a criminal complaint was filed against HC and several co-conspirators known as the Hugo Chavez Drug Conspiracy ("HCDC"). Based upon the information obtained through wiretaps related to the HCDC the FBI began using a tracking device on Defendant's vehicle in June of 2010, on month after the arrest of HC, and continuing into August of 2010.

In October 2010, the defense attorneys involved in the HCDC met with the prosecution to discuss the copy and paste job done be Agent Clegg, referenced above. Recognizing and conceding these errors, the government moved to dismiss their case against HC and his co-conspirators. On December 14, 2010, AUSA Jon Stanford stated at a hearing: "We agree with her [Erlinda Johnson, attorney for Ramon Morales] that these issues are damaging to the wiretap investigation. The wiretap investigation is essential to our evidence in this case. Without that evidence, we are not able to go forward. Without that evidence, we do not believe we can prove our case beyond a reasonable doubt." The court granted the government's motion to dismiss.

In an application for the authorization of the use of a tracking device on Defendant's vehicle filed in November of 2011, Agent Raby states that on June 1, 2011, he learned from a confidential human source that Defendant was involved in the distribution of cocaine in Albuquerque, New Mexico. (SW-000470-471). In August through September 2011, the FBI once again used the investigative technique of placing a warrantless tracking device on Defendant's vehicle. However, "[t]he 2011 attempts were unsuccessful in that the trackers were jettisoned from the undercarriage of Roybal's vehicles. In any event, no information from the warrantless usage of tracking devices is being relied on in this Application." (WP2-000110). This is clearly an attempt to distance Defendant's criminal investigation from the HCDC.

The Government applied for its first wiretap on October 4, 2011. In his affidavit, Agent Geoffrey M. Raby requested authorization for wire interception and recording of communications to and from Defendants phone, per 18 U.S.C. § 2518(5) for a period not to exceed thirty days. It is important to note that Agent Ryan Nelson, who was co-Agent on the HCDC, was also co-Agent in this case. The Honorable C. LeRoy Hansen authorized the wiretap as requested on October 4, 2011. (WP2-000081). In his affidavit, Agent

Raby alleges the following facts concerning the connection between Defendant and HCDC:

a) "Prior FBI investigation confirms that ROYBAL is assisted in his distribution activities by Hugo CHAVEZ-who was a previous supplier of cocaine for ROYBAL." (WP1-000035).
b) "Although a previous wire communication interception has been attempted with members of the ROYBAL DTO, it was not sufficient in obtaining a substantial evidence for the prosecution of Christopher ROYBAL." (WR1-000070).

Hugo Chavez is a named subject of the first wiretap application concerning the Defendant. Agent Raby states: "Chavez has been previously identified as a boss of the DTO, however his current status is undnown. The Federal Bureau of Investigation conducted an investigation of Chavez during 2010. During this investigation agents became aware of the relationship between Roybal and Chavez." Agent Raby goes on to state, "Chavez was later arrested by the FBI for conspiracy to distribute cocaine, however that case was dismissed." (WP1-000029-000030).

The Government applied for its second wiretap concerning Defendant on February 27, 2012. In his affidavit, Agent Geoffrey M. Raby requested "an order authorizing the interception of wire communications over cellular telephone bearing telephone number 505-543-5965 and the roving interception of wire communications over the various and changing cellular telephones used by the Defendant pursuant to 18 U.S.C. § 2518(11)(b)" for a thirty day period. (WP2-000001). The Honorable C. LeRoy Hansen authorized the wiretap on February 24, 2012. The interception began on on February 24, 2012. Interception ceased on March 24, 2012. (WP3-000001-000014). In his affidavit, Agent Raby alleges the following facts concerning the connection between the Defendant and Hugo Chavez:

a) Hugo Chavez is a named subject of the third wiretap application concerning Roybal. Agent Raby states: "Chavez has been previously identified as a boss of the DTO, however his current status is unknown. The Federal Bureau of investigation conducted an investigation of Chavez during 2010. During this investigation agents became aware of the relationship between Roybal and Chavez. Roybal appeared to be working with or underneath Chavez, as it was believed Chavez was supplying Roybal with cocaine during that investigation. During this previous investigation, Roybal was observed by surveillance Agents providing approximately $260,000 to Chavez. Chavez was later arrested by the FBI for conspiracy to distribute cocaine, however, that case was dismissed." (WP2-000023).

b) "A check of the electronic surveillance indices of the FBI, Drug Enforcement Administration (DEA) and the Bueauof Immigration and Customs Enforcement conducted on February 3, 2012, revealed that Hugo Chavez was named in a previous application filed by the FBI for an order authorizing the interceptions of wire communications. The order was signed on May 7, 2010, by the United States District Judge M. Christina Armijo, of the District of New Mexico, authorizing the interceptions for a thirty-day period. Interception pursuant to that Order ceased on May 15, 2010." (WP2-000026).

Concerning Franks v. Delaware, 438 U.S. 154 (1978).

a) "On June 3, 2011, the discarded trash of Roybals's residence was collected and examined." (WP20999192).

b) "On or about June 15, 2011, the FBI, Albuquerque Division began an investigation into the activities of Christopher Roybal, whom CHS-1 advised was selling kilogram quantities of cocaine in the Albuquerque, New Mexico Metropolitan area. " (WP2-000028)

c) Based on the information obtained through the HC wiretap, the FBI used the investigative technique of placing a tracking device on Defendant's behicle in August-September of 2010, one month after Hugo Chavez has been arrested. (WP2-000110).

In his affidavit, Agent Raby alleges the following facts concerning the need for roving authorization:

a) "While en route to his residence, agents observed Roybal to be talking on a telephone while driving. During this time no telephone calls or electronic communications were intercepted on Roybal's PHONE 1, which indicated that Roybal maintains multiple telepohones." (WP2-0000048-000049).

b) "As more fully described below, the October 6, 2011 detection of surveillance caused Roybal's usage of phones to change. Agents believe that it is because of this incident that Roybal and other members of the DTO began to use multiple telephones to communicate with each other. Moreover, agents believe that due to this incident, Roybal adopted the method of changing or dropping cellular phones on a frequent basis." (WP2-000054).

c) "As described below and in the "ROYBAL'S PHONE 2" section, Roybal would continue to communicate with other members of the DTO on Roybal's PHONE 1, however, when the conversation shifted to that of illegal activity, the conversation would cease on Roybal's PHONE 1 and continue on another telephone under the control of Roybal." (WP2-000054).

d) Agent Raby states that work phones 2, 3, 5, 6, & 7 were used to conduct illegal activities. These "work" phones would only be used for a period of less than 30 days and agents believed this was a method aimed at thwarting electronic surveillance of a specified facility and was the direct result of the detection of surveillance that occurred on October 6, 2011. (WP2-000055).

f) "The use of Roybal PHONE 2 marked the initiation of Roybal's use of various changing phones." (WP2-000060-000061).

g) "On November 10, 2011, Roybal's PHONE 2 was deactivated - 30 days after it had been activated on October 9th, 2011. This is another example of Roybal changing phones on a frequent basis and marked the beginning of him purchasing and using phones for only a month or less." (WP2-000067).

h) "On November 10, 2011, Agents identified Roybal as the user of telephone assigned telephone number 505-480-3829 (Roybal's PHONE 3)."

i) "On or about December 6, 2011, Agents identified Roybal as the user of telephone assigned telepohone number 505-453-5965, with no subscriber information, (Roybal PHONE 4) when CHS-1 informed Agents that Roybal had given CHS-1 that number." (WP2-000066).

j) "On December 20, 2011, CHS-1 informed Agents that Roybal was using the telephone assigned telephone number 505-238-2046 (Roybal's PHONE 5)." (WP2-000072).

k) "Through further analysis, Agents observed that the telephone assigned telephone number 505-615-7675 (Roybal's PHONE 6) had a similar frequency of contact with Eckstein's PHONE between January 4, 2012 and January 24, 2012." (WP2-000074) "As mentioned above, Roybal was no longer using Roybal's PHONE 6, on February 2, 2012." (WP2-000075).

B. The Use Of A Passive Collection Device "Sting Ray"

In this case, the FBI conducted a series of wiretaps in their investigation of Defendant. In their efforts to conduct surveillance agents utilized a passive collection device, more commonly known as a "stingray," on two separate occasions to discover the telephone numbers of the phones that Defendant possessed at the respective times the device was used. A stingray is a surveillance device utilized by various law enforcement agencies and the military. Specifically stingrays:

> ...involve an antenna, a computer with mapping software, and a special device. The device mimics a cellphone tower and gets the phone to connect to it. it can then collect hardware numbers associated with the phone and can ping the cellphone even if the owner is not making a call.

The use of this device is documented three times in the following excerpts from various wiretap affidavits filed in this case:

a) "To that end, Agents have been conducting physical surveillance of ROYBAL while **utilizing a device to passively collect signaling information** used from cellular phones in the area; and have begun an analysis of toll records for many of the frequent common calls between ROYBAL'S PHONES. While Agents have identified a number--505-620-2923--that may be TOYBAL'S PHONE 7, toll records have not been received, nor have Agents been able to otherwise confirm ROYBAL is, in fact, using that number."(WP2-000075-000076)

b) "To that end, Agents conducted physical surveillance of ROYBAL utilizing a **court-authorized device** to passively **collect signaling information used from cellular phones in the area**; and conducted an analysis of toll records for many of the frequent common calls between ROYBAL PHONES. Agents identified telephone number 505-620-2923 as possibly being ROYBAL PHONE 7" (emphasis added)(WP3-000099).

c) "On February 27, 2012, Agents conducted physical surveillance of ROYBAL while utilizing a **courrt-authorized** device to **collect signaling information used from cellular phones in the respective areas.** As a result, Agents identified telephone number 505-563-0640 (ROYBAL PHONE 8) as proximately being used by ROYBAL" (emphasis added) (WP3-000100).

The use of this "stingray" device has caused quite a controversy across the country due to the potential Fourth Amendment violations and privacy issues that result from its use. In fact, both Maine and Montana have benned the warrantless use of such devices and Texas has banned all warrantless electronic surveillance.

In this case prosection rejected discovery requests showing the alleged authorizations allowing the use of this device stating they are undiscoverable under Rule 16 of the Federal Rules of Criminal Procedure. However, it was through the use of this device that FBI agents were able to identify "ROYBOL PHONE 7" and "ROYBAL PHONE 8." While nothing is alleged to have been intercepted over phone 7, 716 phone calls and 187 text messages were intercepted over phone 8 that was presumable used by the government. These interceptions involved several alleged co-conspiritors and the affidavit identifies phone 8 as a "work" phone, a term used by agents meaning a phone allegedly used to conduct illegal activities. (WP2-000055).

Since stingray devices are fairly new and shrouded in secrecy, there are few court rulings on the use of such devices. The decisions that have been made appear to fall on how the device is being used and how the use was authorized. The government states:

> with respect to the use of the cell-site simulator, defendant, without factual support, alleges that the use of the cell-site simulator led agents to the identification of an additional phone used by defendant with, in turn, led to the interception of numerous communications. (Government's Response at p. 5)

The government makes no reference to **authorization** ever being granted for the use of the stingray device. Contrary to the government's position, there is ample documented evidence that such a device was used and the information that was gathered from the warrantless use of this device. Supra.

In re the Application of the U.S. for an Order Authorizing the Installation and Use of a Pen Register and Trap and Trace Device, 890 F. Supp. 2d 747 (S.D. Tex. 2010), the government was requesting an authorization for the use of a stigray for a sixty day period to "detect radio signals emitted from wireless cellular telephones in the vicinity of the [Subject] that identify telephones..." Id. at 748. The court took issue with the fact that the government was stating it was applying for the use of a stingray when the intended use of the device did not comply with the definitions of such devices. Specifically, the court pointed out that there was no target telephone identified in the application and under its analysis of 18 U.S.C. § 3123(b)(1)(c), the court found that a telephone number or some other similar identifier must be present in order to comply with the statute. The court also referred to other recent court decisions as evidence that applications for authorization to use a stingray device seeking information about a particular telephone. See eg. United States v Jadlowe, 628 F.3d 1, 6 a. 4 (1st Cir. 2010)("A 'pen register' is a device used, inter alia, to record the dialing and other information transmitted by a targeted phone."); United States v. Bermudez, No. 05-43-CR, 2006 WL 3197181, at *8 (S.D. Ind. June 30, 2006)("A 'pen register' records telephone numbers dialed for outgoing calls made from the target phone."). In the same respect, a target telephone must be identified in order for a trap and trace device to be authorized. See, e.g., In re Application of the United States for an Order Authorizing the Installation and Use of a Pen Register and a Caller Identification System on Telephone Numbers, 402 F. Supp. 2d at 602("trap/trace device...records the telephone numbers of those calling the target phone."). Since the application contained no such information, the court dismissed the application without prejudice.

Here, the applications, when the agents actually attained court authorization, could not have possibly contained a telephone number. In the affidavits detailing the use of the stingray device, it is requested for the use of obtaining Defendant's telephone number, precisely the item needed in an application for a trap and trace/ pen register. Therefore, if the applications for the use of this device was under the guise that it was a trap and trace or a pen register device, authorization was improper under 18 U.S.C. § 3123(b)(1)(c) because the telephone number or some other similar identifier was unknown at the time the agents applied for authorization.

In United States v. Rigmaiden, 844 F. Supp. 2d 982 (D. Az. 2012), a passive collection device was utilized and authorized by a court in tracking the defendant's use of an aircard. However, in that case the authorization came in the form of a warrant for probable cause and not under the guise of a pen register/trap and trace device application. The reason the application was rejected In re the Application of the U.S. for an Order Authorizing the Installation and Use of a Pen Register and Trap and Trace Device, 890 F. Supp. 2d 747 (S.D. Tx. 2012), as discussed above, was the lack of target phone information, which amounts to a fishing expedition. In addition, the government in that case agreed that the proper analysis in determining the legality of the use of the stingray was pursuant to Fourth Amendment search and seizure jurisprudence.

Rigmaiden, 844 F. Supp. 2d at 995-96. Here it is unclear if the agents attained a warrant for the use of the stingray as in Rigmaiden or if they attained it uder the guise of a trap and trace/pen register device as in In re Application. The Supreme Court has also recently extended Fourth Amendment protections to cell phone information. See Riley v. California, 134 S. Ct. 2473, 2491 (2014). This lack of a bright line between permissible and impermissible searches stands at odds with the Supreme Court's "general preference to provide clear guidance to law enforcement through categorical rules." Id. 134 S. Ct. at 2491.

Conclusion

The FBI became aware of Defendant's involvement in the sale of cocaine during their investigation of Hugo Chavez. A case that was tainted by the Agent Clegg's use of information from an affidavit from an unrelated case. Though the HC case was eventually dismissed do to the improper actions of Agent Clegg, yet information gathered during that investigation was used repeatedly in affidavits by Agent Raby in this case. Supra at p. 8. The government should not be able to benefit from the unconstitutional acts from the HC investigation by using information gather from that investigation in this case.

Additionally, the government's unauthorized use of a stingray device clearly violates the principles of the Fourth Amendment of the United States Constitution. Defense counsel should have moved to suppress what is a clear constitutional violation. Defendant has shown that "his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidenc[.]" See Kimmelman v Morrison, 477 U.S. 365, 375 (1986).

In his application for the authorization of the use of a tracking device on Defendant's vehicle filed in November of 2011, Agent Raby states that on June 1, 2011, he learned from a confidential human source that Defendant was involved in the distribution of cocaine in the Albuquerque area. (SW-000470-471). This directly contradicts his affidavits in which Agent Raby states "The Federal Bureau of Investigation conducted an investigation of Chavez during 2010. During this investigation agents became aware of the relationship between Roybal [Defendant] and Chavez." Supra at p. 8. Clearly Agent Raby was not being forthcoming with the Court in how "he learned" that the Defendant was involved in the distribution of cocaine.

WHEREFORE, based upon the facts and matter herein, the Defendant respectfully request the Court vacate his sentence, and enter any other relief that is seen as just and proper.

Signed on this 10 day of October, 2016. Respectfully submitted,

Christopher Roybal
Defendant In Pro se

CERTIFICATE OF SERVICE

I, Christopher Roybal, hereby swear under penalty of perjury that I mailed one true copy of: (1) Defendant's Supplemental Memorandum of Law in Support of His Motion to Vacate, and (2) Certificate of Service by First Class Mail on this ____ day of October, 2016 to AUSA Joel R. Meyers located at P.O. Box 607, Albuquerque, NM 87103.

Christopher Roybal

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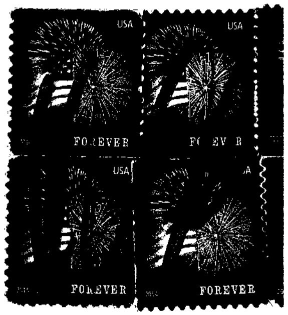

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